In the Queen's Bench.

IN APPEAL FROM SUPERIOR COURT MONTREAL.

JOHN G. McKENZIE, ET AL.,
(Garnishees below,)
APPELLANTS.

AND

DUNCAN McFARLANE,
(Plaintiff contesting Garnishees' declaration below,)
RESPONDENT.

APPELLANT'S CASE.

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This Cause has been before this Court on an appeal by McFarlane from a judgment rendered on the 22nd May, 1855, dismissing his contestation and moyens of contestation to the declaration of the now Appellants as *tiers saisis*. The original action was brought by McFarlane against William H. Delisle, on a promissory note dated 17th October, 1853. Judgment was rendered in favor of McFarlane, on the 23rd October, 1854, and in December following a writ of *saisie arret* was issued, returnable on the 19th, to attach the goods, monies, credits and effects of the Defendant in the hands of John G. McKenzie, merchant, William Whiteford, merchant, and John Lovell, printer, as *tiers saisis*. Each of the *tiers saisis* appeared and made a separate declaration to the effect that he had nothing in his hands.

McFarlane contested the several declarations of the garnishees *by one contestation*, in which is in effect alledged the Defendant's insolvency; that about the 22nd September, 1854, the garnishees, contriving with the Defendant, fraudulently, and with a view to defeat Plaintiff's recourse, to force the Plaintiff to grant a discharge to Delisle, had taken all the effects of the Defendant into their own hands, and had realized the same to their own use jointly and severally; and with a like fraudulent intent and concert, had caused a notarial transfer of all the said property to be made by Defendant to John G. McKenzie and William Whiteford. That McKenzie and Whiteford sold all the property, estate, and effects of the Defendant, of the value of £6000, to John Lovell, for the sum of £2263 16s. 10d., acknowledged in the deed of sale; that the garnishees contrived to delay the Plaintiff's judgment and were liable to the Plaintiff for the full value of the property so fraudulently taken and sold.

Conclusion, that the attachment be declared good and valid, and the several declarations false and fraudulent; that the garnishees be jointly and severally condemned to account for the said several sums of money; that the assignment and sale be declared fraudulent and the garnishees jointly and severally condemned as personal debtors of the Plaintiff for his debt, interest, and costs.

The garnishees severally answered the moyens of contestation by an answer in law, and a hearing was had on that fyled by Whiteford, one of the Garnishees and Respondent in the appeal above alluded to, which answer was based on two grounds.

1. That the Respondent was summoned to appear and answer for himself personally and individually, and did so; that he was not by law bound to answer a contestation of the declaration of other garnishees, and the Plaintiff should have contested the Respondent's declaration separately, and the contestation as made, was illegal and irregular.

2. That it appeared from the contestation, that it was fyled after the expiring of the delay allowed by the Rules of Practice.

The judgment then appealed from dismissed the contestation of McFarlane. The ground assumed in the Court below, as well as in appeal, was that each contestation should have been separate, and tender separate issues, the rights of each of the *tiers saisis* being distinct; and that whatever might be the nature of the allegations of contestation, each *tiers saisi* had right to have his case kept clear of every other contestation, as well after, as before his declaration; and that any other practice must lead to the greatest confusion.

The court of appeal, as will be seen from the judgment copied in the appendix, held the allegations of the contestation sufficient, and that clear allegations of fraud and collusion as well on the part of the Garnishees, as of the Defendant *if made out in proof* warranted a joint and several condemnation against the garnishees.

After the rendering of the judgment in appeal, the case went to enquête in the Superior Court, and the Judgment now appealed from condemned the Appellants, McKenzie and Whiteford, jointly and severally, as mentioned in the Judgment copied in the Appendix:—

Three witnesses were examined in support of the contestation, GAULT, BAXTER and WALKER, three of the Defendants creditors. None of them proves any fact or circumstance indicative of the fraud or collusion alleged.

GAULT says, that in March, 1854, Delisle stopped payment, and that his firm took their old debt, some £65, in goods, Delisle offering to pay his Creditors in goods, or to pay in cash by instalments with delay. That his firm ranked for their new debt of about £40 under the deed of assignment. In his examination in chief he mentions that in March, 1854, the witness "observed to Delisle that he had a large stock of goods, "which he represented as amounting to £5000, and from appearances, I judged that "his estimate was not out of the way."

Cross-examined he says, "I did not examine the state of his affairs, at either of his "failures so as to be able to say what his estate was worth."

Question.—"Do you know any circumstance whatever, to lead you to suppose that "there was any fraud on the part of any of the Garnishees in this cause?

Answer.—"No I do not. I cannot pretend to swear to the value of the stock. I "only state what Delisle mentioned to me."

BAXTER says, he also took goods for his account save £60 or £70. He adds that "Delisle offered goods to those who were willing to accept them. I saw his stock at "that time, (*March*, 1854,) which to me, appeared large for his business."

His Cross-examination was as follows:—"The defendant stopped payment in "March, 1854. He then went on with the business for six months. I was not a credi-"tor at the time of his second stoppage."

Question.—"Do you know any circumstance whatever, to lead you to suppose that "there was any fraud on the part of the Garnishees?"

Answer.—"No, nothing whatever."

WALKER states, that *in March*, 1854, he thought the stock so good from its appearance that he would get 20s. in the £, and that he understood, and believed it was worth that sum.

When Cross-examined, he states he does not know what the stock was in September, 1854, when the assignment was made, adding, "The estate was getting worse and "worse, and I believed it was for the benefit of the estate that this assignment should "be made, and I became a party to it, and I took Mr. Whiteford's word, as to how the "estate was going, he being a large creditor."

Question.—"Have you a knowledge of any fact or circumstance to shew that any of "the assignees or Garnishees acted fraudulently, or so as to diminish the fund for the "benefit of the creditors? If so, state the same.

Answer.—"No. I consider whatever was done by the assignees, was done for the "benefit of the estate."

With such evidence alone to support the extraordinary allegations of fraud and collusion on the part of the Garnishees, it was wholly unnecessary for the appellants to enter into evidence. They did examine five witnesses. From their evidence it would appear that about a year previous to the assignment, Delisle settled with some of his creditors by giving them stock in trade for the amount of their debts; and with others, by getting

delay and agreeing to pay 20s. in the £ by installments of 2s. 6d., each payable every three months. Two of these only were paid, the stock was becoming in a worse position, and as a last resort, the assignment, characterized by the Respondent as fraudulent and collusive, was made, with the consent of all the creditors, except the Respondent. The stock which was left was but the refuse of a fancy dry goods stock, with but few staples in it. No commission or remuneration of any kind was paid to Messrs. McKenzie and Whiteford the assignees. The witnesses for the Plaintiff agree with those of the Appellants, that the best possible arrangement for the creditors was made.

Smith says, "Witness examined Delisle's stock, considers the sale by Delisle's "assignees as the best thing that could be done for his creditors."

Colquhoun says the same thing, and adds "that he knows nothing to induce "him to believe that the assignees did not act in good faith. Witness was in good faith "and thought the arrangement the best that could be made."

Kay shews that the goods invoiced at £1528 3s. 8d., were sold at public sale for £719 11s. 10d. on Lovell's account, adding "They brought their full value. It was the "cull of a large stock of unsaleables."

Kollmyer, Lovell's clerk, says he "extracted from the books of Mr. Lovell a statement "of the whole amount paid by Mr. Lovell for debtors estate, and of the amounts received by "Mr. Lovell from the proceeds of the estate. The statement is marked A, and produced "by witness." It shews that Lovell lost some £975 by the transaction. Mr. Lovell in his answer to the *third* interrogatory, says "I quite was aware that they (the goods) were "not worth so much as I paid for them, although put down in the schedules at a much "higher figure. The estimates in the schedules are far too high in my opinion, and I "know I lost, at least, Nine Hundred Pounds by the purchase."

J. G. McKenzie in answer to the same question says, "there was no other intention "in the sale of the stock to Lovell, than to do the very best that was possible for the "benefit of the creditors generally, who all highly approved of the sale, as they were "satisfied it was the best thing that could be done, in fact a *restant*, or rubbish. No "other person could be found that would make an offer for it, and I believe Mr. Lovell "lost seriously by the purchase. The creditors found some difficulty in getting the "assignment made, and afterwards we were glad, after much trouble, to prevail on "Lovell to take the estate at ten shillings in the pound."

The other garnishee, Whiteford, who left the country immediately on the service of the seizure, and has not returned, being examined in England gives a similar account of the transaction in his answers to the 2nd and 3rd interrogatories.

To the 2nd interrogatory, he says:

"We did take an assignment of Delisle's estate in perfect good faith, and executed "it in like good faith. As far as my memory serves, at this distance of time, the amount "per inventory was about £5000; but owing to incompetency of Delisle as buyer, and "frequent forced sales at auction, it was drained of the ready saleable portions, that its "real value was certainly not half of what it shewed in figures. I knew nothing of "McFarlane's objection to the arrangement until after the sale to Lovell, and then he "expressed himself to me not dissatisfied with the sale, which he could not deny to be a "good one, but that the assignment contained a condition of discharge."

To the 3d interrogatory, he says:

"We had no other intention, in the assignment, than to get the estate out of Delisle's "hands, where it was only likely to get worse, (by goods further deteriorating, while "expenses were running on) and to make the most of it for the creditors, of whom we "were the greatest. We only sold to Lovell because we got more from him than we "could from any one else. He was with difficulty persuaded to buy, and I have reason "to believe he lost considerably by the transaction. I wanted Mr. McKenzie as the "largest creditor to buy it, but he said he would not give 8s. in the £ for it, and I "decidedly would not like to have done it either. I have seen stocks sold from 6s. 8d. "to 8s. in the £. I have had much experience of bankrupt stocks, but never knew "a worse one than the one in question. This stock was sold to Lovell at 10s. in the "£, (all round) and was considered by all the creditors as well as ourselves an excellent "sale. We had a great deal of trouble in the matter and charged no commission. "The creditors generally expressed themselves satisfied."

It will be seen from the inscription (No. 56 of record) that the case was inscribed "for hearing on the merits for the 23rd December, 1858." It was argued and taken *en delibere*. On the 28th February, 1859, the Honorable Judge who heard the case rendered judgment in favor of the now appellants, and the contestation of McFarlane was dismissed with costs, on the ground that the contestant had failed to establish his contestation, or that any fraud or collusion had taken place.

On the 3rd March a writ of appeal, returnable on the 18th March was taken by McFarlane and served upon the now appellant's counsel in the usual way, with the names of two sureties, and with notice of security for the 7th March. This security was not put in. The case was taken back by the Judge, and on the 31st March another contradictory Judgment, being that now appealed from, was rendered. This Judgment, and it is submitted, ought not to be maintained for the following amongst other reasons.

1. The contestant entirely failed to prove the allegations of his contestation.

It will be seen on examination that the contestation rested on the following allegations:

That the Garnishees "contriving and intending to injure, wrong, and defraud the "Plaintiff, and to defeat his recourse and legal remedy against the Defendant, and to "deprive him, the Plaintiff of his just share and proportion of the defendant's goods, "property and effects, and with a view, unjustly and illegally, to force and coerce the "Plaintiff into granting a discharge in full, without any adequate consideration, which "the Plaintiff was not and is not bound to do,—had all the said estate, stock in trade, "merchandize, fixtures, monies, notes, securities, policies of insurance, debts, assets, "and effects, without any estimate or proper valuation thereof, taken into their own "hands, custody, possession and control, and assumed to be the owners and proprietors "thereof, and converted and appropriated *the same for their own use and profit jointly and "severally*, and they then and there held, and have ever since continued to hold, and "*do now hold* the whole of the said stock in trade, goods, merchandize, fixtures, monies, "notes, securities, policies of insurances, debts, assets and effects in their own hands, "power, custody, and control."

Next, that "with a view to frustrate Plaintiffs remedy, the Garnishees, contriving "with the defendant caused, and pretended to cause a certain pretended deed of assign-"ment to be made," and had sold the estate and effects to Lovell for £2263 16s. 10d., which sum it is alleged "the said John Gordon McKenzie, and William Whiteford at "the time of the issuing and service of the *saisie arret* in this cause had and still have "in their power, custody, and possession, as well as a further sum of £425 which they "had previously got from the defendant, but subsequent to his insolvency, *under pretence "that they were thereto entitled as a payment of so much in the pound* of their respective claims "and as creditors of the Defendant."

Next, that the stock in trade, &c., was of the value of six thousand pounds currency, and was fraudulently sold; that the Garnishees were liable not only "for the "said sum of £2263 16s. 10d. currency, the alleged price of the said stock in trade, "goods, merchandize, fixtures, monies, notes, &c., and the said sum of £425 currency, "making together £2688 16s. 10d. currency, but for the sum of £6000 currency, the "actual value of the said stock in trade, goods," &c.

Next, that "with a view to carry out their purposes as aforesaid, and to frustrate "and defeat the Plaintiff in seeking his lawful recourse against the Defendant, they, "the said John Gordon McKenzie, William Whiteford, and John Lovell, in concert with "the Defendant, caused the Plaintiffs demand to be disputed, frustrated, and delayed, "although they had no just cause for so doing, until they succeeded in making the "appropriation of property above alluded to, which they could not have done had they "not so disputed, frustrated, and delayed the Plaintiffs remedy."

Next, that the declarations of the Garnishees "were, and each of them is false "and untrue, and the said Garnishees at the time of the service upon them respective-"ly of the writ of attachment in this cause, were jointly and severally indebted, and "had, and held in their hands, custody, power, and possession, monies, property, goods, "merchandize, securities, debts, credits, assets, and effects, *of and belonging to the Defen-"dant* of the value, and to the amount of Six Thousand Four Hundred and Twenty-

" Five Pounds, currency, and upwards, as above more particularly specified, which they " had unjustly and wrongfully taken and appropriated in manner aforesaid, and for " which they are accountable in this cause."

The conclusions following such allegations of fraud were, that the seizure be declared valid, and that the declarations " may be declared false and fraudulent, and " be overruled and declared null and of no effect, and that the above-mentioned pre- " tended deeds of sale and assignment may be declared null and void, and of " no effect as regards the said Plaintiff"; and that the Garnishees be jointly and severally condemned to account for the sums of £2688 16s. 10d., and the stock, &c., " the " whole thereof amounting to £6426," and that they be jointly and severally declared liable for the same, and " be jointly and severally condemned and declared the personal " debtors of the said Plaintiffs for the amount of his said debt, interest and costs, and " subsequent costs."

These allegations plainly rendered proof of fraud and collusion necessary, or that the Garnishees had property or effects of the Defendant in their hands. No such proof was made; the fraud was alleged only, and manifestly the allegation could not be taken as equivalent to proof of fraud, or so as to shift the onus upon the Garnishees. It is submitted that it appears from the record, that the good faith of the Garnishees is established, and proof made that the assignment and sale were in the best of faith, and were beneficial to the creditors.

The only ground upon which a joint and several condemnation could be given—there being no joint and several contract—was not made out, namely, fraud and collusion.

2. The judgment treats the Garnishees as if the proceedings taken, were by action to account for monies belonging to Plaintiff, or an action to be allowed the advantage of the assignment. The contestation is not equivalent to such an action; nor to an action to set aside and annul the assignment on the grounds of fraud. To enable the Court legally to set aside the assignment, all the parties to it must be before the Court. Here none of the creditors, parties to the deed, were served either with the writ or contestation. The Defendant, Delisle, was not even served with the rule or with the contestation, although his fraud and complicity with the Garnishees, is alleged as the ground of the contestation; nor was any appearance fyled on his behalf.

3. The grounds taken in the special answers, although held by the Court of Appeal not to be sufficient to dismiss the contestation *on demurrer*, ought to have been maintained on the merits. That there being no proof of fraud, there could be no joint and several liability against the Garnishees; that under the deed of assignment, the Garnishees, Whiteford and McKenzie, did not become the personal debtors of the Defendant, but were simply Assignees, Trustees, or Mandataires, acting for him and for the creditors, and were bound to carry out the assignment in good faith, according to its terms. It will be seen that the Garnishees take the ground that the seizure *(saisie arrêt)* in their hands as actually made, called simply for a declaration on oath as to what each of the Garnishees, individually and personally, owed or had in his hands belonging to the Defendant. This declaration was made in conformity with truth and the facts of the case. The assignment was carried out in good faith, and by reason thereof the Garnishees, Whiteford and McKenzie, did not become at any time personally the debtors of, or liable to the Defendant; that, as McKenzie sets up in his answer, " even if the said party now pleading had been bound to answer on oath, and fyle his " declaration in obedience to the said writ in his said quality of Assignee, Trustee, " Agent, Attorney or Mandataire, yet that the declaration made by him was never- " theless true, and well founded in fact; * * * * and the said party now pleading " cannot by law be made responsible for the said alleged acts, frauds, or omissions of " the said William Whiteford, John Lovell, and William H. Delisle, or any of them; " * * * nor can he, the party now pleading, be condemned, jointly and severally, " with the said parties, or either of them."

It will be seen that the answer of McKenzie & Lovell to the contestation of Plaintiff did not allude to a note given by Lovell, as part of the consideration of the sale.

In point of fact, Whiteford as acting assignee, alone had received this note, and he alleged in his third answer, "that in fact said John Lovell delivered to the said party "now pleading as part of the price and purchase money referred to in the said deed of "sale from the said assignees, his the said John Lovell's promissory note bearing date "at the City of Montreal, on the 23rd day of September, 1854, payable at three months "from the date thereof to his own order, the said note being for £105 5s. 5d. which the "said party now pleading, avers to be the only thing remaining in his hands, custody, "power and possession as such assignee, agent, attorney, or *mandataire*, as aforesaid."

This note he alleges to have been offered to the Plaintiff and refused by him, and he produces and fyles it, and prays *acte* of its deposit in Court, and of the consent of the assignees that it be delivered to the Plaintiff *if so ordered by the Court*, and prays further that the party pleading by reason of his good faith be not in any event condemned to costs.

It will be seen that even if this note were to be treated as proof of the falsity of the declaration of Whiteford on oath, and as being the property of the *Defendant*, yet the judgment rendered does not order *the note* to be delivered up by *Whiteford*, who alone refers to it, and whose admission on the record, in his own separate and distinct answer, could not bind McKenzie. The judgment condemns McKenzie & Whiteford, jointly and severally to pay an indefinite amount within fifteen days, in default of which a joint and general condemnation is rendered against them for £311 7s. 1d., interest and costs.

4. Assuming for the sake of argument that the *saisie arrêt* in the hands of the garnishees as taken, was not taken against each garnishee as an individual, and that it was not legally answered by them in their individual and personal character; assuming also, that there was falsity in their declaration on oath, and that the note was the defendants property, assuming also, that the admission *by a pleading* of one garnishee could bind the other, that other being simply co-assignee or joint mandataire, and that it was competent for the Plaintiff to produce against the garnishees as summoned, the assignment and sale to which they were parties in their capacity, notwithstanding these assumptions mentioned, the judgment, it is respectfully submitted, should only have ordered the note or security to be realized, or at most handed over to the Plaintiff, unless indeed the fraud alleged, had been out in proof.

5. The fact of the assignees taking a note for a part of the stock sold, cannot be held to subject them to pay the note themselves, unless some negligence or fraud is shewn, still less ought it to subject them to the *payment of double the amount of the note*. Even a paid agent may take a note for a debt due to his principal, unless direct instructions were given to the contrary. If the fact of Whiteford, as assignee, holding a note of *Lovell's* payable to *Lovell's* order, constituted Whiteford & McKenzie, jointly and severally the personal debtors of the Defendant to the extent of the note, the judgment should in no case have gone further than a condemnation for that sum.

6. The judgment as rendered is vague and uncertain. It condemns the garnishees McKenzie & Whiteford "to account and pay their said dividend or rateable proportion upon the estate of the Defendant, and of the consideration of the said deed," without mentioning what is that proportion or dividend.

It also arbitrarily fixes a sum to be paid, and condemns them to the penalty of paying the whole debt, unless this undefined dividend is paid and accounted for. In cases of *comptables*, where the precise amount due the Plaintiff is not ascertained, *through Defendant's default*; or in case of *gardiens*, where goods under seizure are made away with, and cannot therefore be valued,—the Court may order an indefinite sum to be paid by way of penalty, or even the Plaintiff's whole debt to be paid. Here the note might be delivered up, or the Garnishees condemned to guarantee its payment, or even to pay it within the fifteen days; but this is very different from the judgment rendered, which declares they acted in good faith, and yet condemns them jointly and severally to pay the whole of Plaintiff's debt and costs, and the *unascertained* subsequent costs, as well as the costs of contestation.

The other creditors of Delisle had a right for themselves to consent to the assignment, and to ratify the sale to Lovell, giving Delisle a discharge for their own debts.

In doing so they violated no law; and the Garnishees, assuming them to have acted in good faith, are not subject to personal condemnation for the amount of the Respondent's debt.

McFarlane was not bound to consent to the assignment, and give Delisle a discharge in full. He had his option to treat the assignment as a fraudulent one, and seize the stock, even before judgment, and thus prevent the assignment being carried out; or he had a right to bring his action to get the benefit of the assignment irrespective of the discharge in full, or an action to set aside the whole assignment as concerted and fraudulent, and to render the party or parties guilty of the fraud, responsible for their fraudulent acts to the extent of his debt.

This he had not done and it is submitted that the judgment, as now rendered and appealed from, ought to be reversed.

A. & W. ROBERTSON,
Attorneys for Appellant.

Montreal, Sept. 1st, 1859.

APPENDIX.

No. 1.

Copy of Judgment as rendered on the 31st March, 1859.

Thursday, the 31st day of March, 1859.

PRESENT:—The Honorable Mr. Justice BADGLEY.

"The Court having heard the parties, by their respective Counsel, upon the merits of the contestation raised by the said Plaintiff to the declaration of the several *tiers saisis* in this cause, and upon the merits of the *demande en saisie arret*,—having examined the proceedings, proof of record, and deliberated:—Considering that the said parties contesting the declaration of the *tiers saisis*, by them severally filed in this cause, have not established the material averments of the said contestation; and considering that that the said *tiers saisis*, John Gordon McKenzie and William Whiteford, became in good faith, under and by virtue of the deed of assignment to them made by the defendant, as in his said contestation alleged, the assignees of the estate of the Defendant—to wit, of his stock in trade, debts, and effects—and trustees of his said estate for the benefit of his creditors, with power to realize, the said estate for the best advantage of the said creditors; and did in like good faith, and for the like advantage of the said creditors, as such assignees and trustees, realize the said estate by selling the same to John Lovell, another of the said *tiers saisis*, by deed of sale to him, by them made, as in the said contestation stated, for the consideration in the said deed of sale set forth. And considering that no fraud or collusion hath been established against the said *tiers saisis*, or either of them, as alleged in the said contestation, by reason of the said assignment and sale severally made as aforesaid,—doth dismiss the contestation as regards the said *tiers saisis* John Lovell, but without costs. And considering that in and by the said deeds of assignment and sale, the said John Gordon McKenzie, and William Whiteford, assignees and trustees aforesaid, became entitled to receive and received the said consideration-money of the said sale, for the benefit of the Defendant's creditors, and among others of the contesting parties, and as such have thereby to account and pay to the said contesting party their dividend or rateable proportion of the said consideration as and upon the amount of their claim against the said estate, notwithstanding the clause in the said deed of assignment contained, limiting such dividend or proportion to the creditors consenting to Defendant's discharge by virtue of the said deed of assignment; which said limitation is by this Court declared to be ineffectual with reference to the claim of the said contesting parties.—Doth maintain the said contestation in respect of the said dividend and proportion, and doth condemn the said *tiers saisis*, John Gordon McKenzie and William Whiteford, jointly and severally to account and pay to the said contesting parties, within fifteen days after service upon them or either of them of this judgment, their said dividend or rateable proportion upon the estate of the Defendant, and of the consideration-money aforesaid under the said deed of sale; failing which, that the said *tiers saisis*, John Gordon McKenzie and William Whiteford, do pay, jointly and severally, to the said contesting parties, Plaintiffs *par réprise d'instance*, the amount of their said debt, interest and costs, and subsequent costs, under and by virtue of the judgment obtained by the said Plaintiff, Duncan McFarlane, against the said Defendant, on the twenty-third day of October, one thousand eight hundred and fifty-four, and namely, the sum of two hundred and eleven pounds, seven shillings and one penny, currency, the principal of the said judgment, with interest upon the sum of two hundred and ten pounds ten shillings and nine pence, from the twentieth day of January, one thousand eight hundred and fifty-four, until paid, and the costs of the said judgment, taxed at the sum of nineteen pounds fourteen shillings and five pence currency, and the subsequent costs accrued. The whole in any case with costs of this attachment or *saisie arret* and of the said contestation against the said *tiers saisis*, John Gordon McKenzie and William Whiteford, *jointly and severally*, *distraits* to Messieurs Cross & Bancroft, Attornies of the said contesting parties and Plaintiffs, *par réprise d'instance*."

(Signed) MONK, COFFIN & PAPINEAU,
P. S. C.

No. 2.

Copy of Judgment rendered in appeal in McFARLANE *Appellant* vs. WHITEFORD *Respondent.*

13 March, 1857.

1o. Considérant qu'en vertu du bref de saisie arrêt émané à la requête du Demandeur, trois tiers saisis ont été dûment et régulièrement cités en justice, dans l'instance dont il s'agit, chacun desquels a, par déclaration séparée, affirmé sous serment, ne rien devoir au Défendeur ni n'avoir aucun effet à lui appartenant. 2o. Considérant que le Demandeur suivant le cours ordinaire de la procédure a contesté ces trois déclarations, alléguant à l'appui de cette contestation *des faits et dol et de fraude communs aux dits trois tiers saisis et au Défendeur comme ayant été de propos délibéré et par collusion concertés entre eux et exécutés de même au préjudice du dit Demandeur que si ces faits énoncés dans les moyens de contestation produits par l'Appelant sont vrais et peuvent être établis par la preuve à faire*, dans l'instance, les tiers saisis comme y ayant participé en sont *personnellement et solidairement responsables* vis-à-vis de l'Appelant qui selon ses allégués en serait la victime. 3o. Considérant que selon les énoncés de l'Appelant contenus dans ses dits moyens de contestation, les dits tiers saisis doivent être regardés comme étant soumis à cette responsabilité solidaire envers lui, et que d'une telle responsabilité est né pour lui contre eux un droit d'action en justice de même nature; que, par conséquent, il était bien fondé à présenter sa contestation des déclarations des tiers saisis, et à prendre des conclusions personnelles et solidaires contre eux par un seul et même acte, ainsi qu'il l'a fait devant la cour de première instance; que de plus, sans préjudicier en aucune manière aux droits et aux prétentions des parties contestantes, ce mode de procédure a l'effet d'éviter à frais puisqu'il peut donner lieu à un seul et même jugement sur ces mêmes droits et prétentions. 4o. Considérant, en conséquence, que dans le jugement dont est appel il y a mal-jugé, en ce qu'il maintient la réponse en droit ou exception à l'instance, présentées par l'Intimé Whiteford à la contestation que l'Appelant à fait des déclarations des trois tiers saisis par un seul et même acte de procédure, le dit jugement, quoique non motivé, ne pouvant d'après l'état de l'instance n'avoir eu d'autre base que le fait que cette contestation a été ainsi présentée par un seul et même acte :—

Infirme le susdit jugement dont est appel, savoir : le jugement rendu par la Cour Supérieure siégeant à Montréal, le vingt deuxième jour de mai mil huit cent cinquante cinq ; et cette cour procédant à rendre le jugement que la dite cour supérieur aurait dû rendre déboute le dit tiers saisi Whiteford, de sa dite réponse en droit ou exception d'instance, avec dépens, et ordonne qu'il soit, en la dite cour de première instance, passé outre à l'instruction du procès et à l'audition et au jugement au mérite de la contestation mue entre les parties, de même que si la dite réponse en droit ou exception n'avait jamais été faite, et quant au frais du présent appel. Cette cour condamne l'Intimé à payer à l'Appelant ce que le dit appel a fait encourrir à ce dernier; enfin il est ordonné que le dossier soit remis à la dite cour supérieure siégeant à Montréal. Et la cour sur motion de MM. Cross et Bancroft, avocats de l'Appelant, leur accorde distraction des frais sur cet appel."

[*Signé*] J. U. BEAUDRY,
Greffier des appels.